UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDYTHE S. SEAS, Appellant,	)	DOCKET NUMBER CH-0752-96-0285-B-1
v.	)	
U.S. POSTAL SERVICE, Agency.	)	DATE: JUN 19, 1998

Wendy W. Wanchak, Esquire, Avon, Connecticut, for the appellant.

Michael K. Brown, Esquire, Cincinnati, Ohio, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has petitioned for review of a remand initial decision that affirmed an agency action removing her from her Postmaster position. For the reasons set forth below, we GRANT the petition for review and MITIGATE the removal action to a demotion to a position not lower than the EAS-18 level and within the appellant's commuting area.

BACKGROUND

Procedural Background

The agency removed the appellant from her EAS-20 Postmaster position in St. Marys, Ohio, effective January 28, 1996, based on three specifications of unsatisfactory performance and a single specification of falsification of financial documents. Initial Appeal File (IAF), Tab 4, Subtabs 4a, 4c. On appeal, the administrative judge sustained one specification under the first charge, sustained the second charge, and affirmed the agency's removal action. IAF, Tab 17. The appellant filed a petition for review challenging the administrative judge's findings regarding the falsification charge and the penalty.[1] Petition for Review File, Tab 1. In a March 6, 1997 Opinion and Order, the Board found that the administrative judge correctly sustained both charges. *Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 428 (1997). The Board also found, however, that it was necessary to remand this appeal to the administrative judge for her to make additional factual findings pertaining to the penalty determination. *Id.* at 428-31.

Factual Background

The basic facts surrounding the falsification charge are no longer in dispute. In late August of 1995, the appellant performed an audit of the Postal Service vending machine account at the St. Marys, Ohio, Post Office, which was the primary responsibility of a subordinate employee, Supervisor of Customer Service, Lyn Lilly. IAF, Tab 4, Subtab 4e at 13-14; Hearing Transcript (HT) at 35-38, 77-78 (testimony of Lilly); HT at 261, 271-72, 286, 290-92 (testimony of the appellant). The appellant conducted the audit in preparation to transfer the leadership of the office while she took extended medical leave. HT at 283-85

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[1] The sustained unsatisfactory performance specification is based on the appellant's knowledge of the combination to the safe in the St. Marys, Ohio, Post Office and her access to the key for the vending credit in violation of agency accounting procedures. IAF, Tab 4, Subtab 4c.

(testimony of the appellant). The audit revealed a small shortage within the agency's tolerance. HT at 299 (testimony of the appellant); IAF, Tab 4, Subtab 4e at 13-14.

A subsequent audit of the vending machine account in the first week of September of 1995 revealed a shortage of $1,795.92 and that Lilly's signature on the audit report was a forgery. IAF, Tab 4, Subtab 4e at 10-14; HT at 46-47 (testimony of Lilly). An examination of the audit report itself reveals that it contains a simple but serious error in addition that concealed a shortage of $1,028.76. IAF, Tab 4, Subtab 4e at 14. Moreover, some of the digits appear to have been altered. *Id.* at 13. The agency has not charged the appellant with theft, misappropriation of postal funds, or incorrectly completing the audit report. IAF Tab 4, Subtab 4c at 2. The gravamen of the agency's falsification charge is that the appellant signed her name in the "Examiner's Signature" box, and signed Lilly's name in the "Servicing Person's Signature" box on the audit report form. Id.; *see also* IAF, Tab 4, Subtab 4e at 14.

In our March 6, 1997 Opinion and Order, we discussed in detail the elements required to prove a charge of falsification and applied those elements to the facts of this appeal. *Seas*, 73 M.S.P.R. at 425-28. We found that the agency proved that the appellant signed Lilly's name to the Retail Vending Credit Examination Report with the intent to defraud, mislead, or deceive the agency into believing that Lilly signed the form herself. *Id.* at 427-28. Accordingly, we found that the administrative judge correctly sustained the falsification charge. *Id.* at 428.

We noted in our decision that Billy Anderson, the Senior Manager of Post Office Operations in Cincinnati and the proposing official in this appeal, testified that the purpose of the signature block on the audit form was to verify that the

individual was present for the audit.[2] *Id.;* HT at 138-139. We also noted that, if Lilly was present for the audit and the appellant signed Lilly's name to the audit form, the act of falsification was less serious and mitigation of the penalty might be appropriate. *Seas*, 73 M.S.P.R. at 429. Because the administrative judge failed to adequately address the question of whether Lilly was present for the audit, we remanded this matter to the administrative judge for her to address that issue. *Id*. at 429-431.

In her remand initial decision, the administrative judge found that Lilly was present when the vending stock was counted but was not present the following day when the appellant completed the audit report by totaling the figures and apparently introduced errors into the report by making errors in arithmetic and altering some of the figures. Remand Initial Decision (RID) at 3-8. She also found that the seriousness of the appellant's misconduct outweighed any mitigating factors and that removal was within the tolerable limits of reasonableness for the sustained misconduct. *Id*. at 8-12. In the appellant's petition for review of the remand initial decision, she reargues many of the issues regarding the merits of the agency's charges that were previously resolved in the March 6, 1997 Opinion and Order, but she does not disagree with the administrative judge's factual findings on remand. *See Seas*, 73 M.S.P.R. 422; Remand Petition for Review File (RPFRF), Tab 1 at 1-8. The appellant does contend, however, that the penalty of removal was excessive. RPFRF, Tab 1 at 8. In its response to the petition for review, the agency does not disagree with administrative judge's remand initial decision. RPFRF, Tab 3.

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[2] Our use of the word "audit" with respect to Anderson's testimony in our previous decision may have been slightly imprecise as Anderson specifically testified that the signatures on the audit report form verified that an individual "counted the vending stock." HT at 138.

ANALYSIS

To the extent that the appellant is rearguing factual questions that were decided in the March 6, 1997 Opinion and Order, we invoke the law of the case doctrine to decline to reconsider the prior findings. Under the law of the case doctrine, a tribunal will not reconsider issues that have already been decided in an appeal. *Griffin v. Office of Personnel Management*, 75 M.S.P.R. 263, 269 (1997); *O'Connell v. Department of the Navy*, 73 M.S.P.R. 235, 240 (1997). Although there are exceptions to the doctrine, the appellant does not argue the existence of facts that would support the finding of an exception to the law of the case doctrine, and we discern no such facts. *Griffin*, 75 M.S.P.R. at 269-70; *O'Connell*, 73 M.S.P.R. at 240. Thus, under the law of the case doctrine, we decline to reconsider the appellant's arguments regarding the merits of the agency's charges.

We have considered the administrative judge's uncontested factual findings on remand and discern no errors in those findings. *See* RID at 3-8. As discussed, below, however, we find that the administrative judge erred in her penalty analysis.

The Board will review an agency-imposed penalty to determine if the agency exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Falsification is generally considered a serious offense that affects an employee's reliability, veracity, trustworthiness, and ethical conduct, and the Board has frequently upheld the penalty of removal for a sustained charge of falsification. *See, e.g., Kirkpatrick v. U.S. Postal Service*, 74 M.S.P.R. 583, 591 (1997); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 242-44 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table); *Haack v. U.S. Postal Service*, 68 M.S.P.R. 275, 283 (1995); *Tanner v. Department of Transportation*, 65 M.S.P.R. 169, 172 (1994); *Stewart-Maxwell v. U.S. Postal Service*, 56 M.S.P.R. 265, 275 (1993).

Nevertheless, the penalty for a sustained charge of falsification must be determined on a case-by-case basis considering the circumstances surrounding the misconduct. *See, e.g., White v. U.S. Postal Service,* 71 M.S.P.R. 521, 529 (1996); *Gunn v. U.S. Postal Service,* 63 M.S.P.R. 513, 518-19 (1994); *Stein v. U.S. Postal Service,* 57 M.S.P.R. 434, 441 (1993); *Perez v. U.S. Postal Service*, 48 M.S.P.R. 354, 356-57 (1991); *Rigilano v. U.S. Postal Service*, 41 M.S.P.R. 513, 519-20 (1989).

In *Gunn,* for example, the Board considered the reasonableness of an agency-imposed demotion from a supervisory position to a part-time flexible position based on the misconduct of falsifying another employee's signature on a leave slip and presenting that slip to the employee's supervisor for approval. 63 M.S.P.R. at 518-20. The Board noted that the appellant could have avoided any charge of misconduct by indicating that he was signing for a colleague but that, in any event, the conduct constituted a "technical falsification" similar in nature to a de minimis theft. *Id*. at 519.[3]

As noted above, the administrative judge found on remand that Lilly was present at the initiation of the audit and participated in the counting of the vending stock but did not participate in completing the audit report form and adding the figures. RID at 3-8. As also noted above, the Senior Manager for Post Office Operations in the Cincinnati area, Billy Anderson, testified that the purpose of the signature blocks on the audit form was to "verify the fact that they both set down and counted the vending stock." HT at 138. Neither Anderson nor another agency official testified that the signature constituted a certification of the correctness of the audit report. *See* HT. Although other Postal Service forms do

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[3] In *Gunn,* all the charges were not sustained. The Board found that the agency's penalty exceeded the bounds of reasonableness and reduced the penalty to a 5-day suspension.

contain such certification language, the audit form at issue in this appeal does not. *See* IAF, Tab 4, Subtab 4e at 14.

Thus, we believe that the appellant's actions are similar but, as explained below, not identical to the situation in *Gunn*. Lilly's signature was required on the audit report to show that she was present for the counting of the vending stock and the record shows that Lilly was in fact present for the count. RID at 3-8; HT at 138. The similarity of this appeal to the situation in *Gunn* is supported by the testimony of Charles Caton, the District Manager for Customer Service and Sales and the deciding official in this appeal, who testified that, if the appellant had printed Lilly's name on the audit report rather than signed it, there would have been no falsification charge. HT at 174.

The instant appeal is not identical to the circumstances in *Gunn*, however, because in that case the Board found that Gunn's conduct did not result in any benefit or personal gain. 63 M.S.P.R. at 518. Here, the appellant did gain because her actions misled, albeit only temporarily, her superiors into believing that Lilly signed the audit report and thus presumably agreed with its contents. The signatures on the audit report do not constitute a certification as to the accuracy of the report. However, an employee's signature on the audit report form does indicate that she agrees with the report.[4] Thus, by placing Lilly's signature on the form, the appellant represented that Lilly agreed with the audit report and it is possible that, as a result, the audit report was more readily accepted as accurate.[5]

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[4] Even in the absence of certification language, it is clear that an employer has a right to expect that when a supervisor's signature appears on a document that the document reflects her belief.

[5] Common sense dictates that an audit report agreed to by two supervisors (as indicated by their signatures) is more reliable than an audit presented by only one employee since the two individuals would either have to make the same error or

We acknowledge that the audit form contained serious errors, but the agency did not charge the appellant with falsifying the audit report itself and the narrative under the falsification charge in the notice of proposed removal does not even mention the inaccuracy of the audit report. IAF, Tab 5, Subtab 4c. It is well settled that "[t]he Board may not impose discipline based on a charge that the agency could have brought, but did not." *Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 338 (1994), *aff'd*, 64 F.3d 78 (Fed. Cir. 1995) (Table); *see Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 459 (1991), *aff'd*, 43 F.3d 663 (Fed. Cir. 1994); *see also Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401, 404 (1997) (the Board reviews an agency's adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more adequate or proper basis). Therefore, the inaccuracy and apparent alterations to the audit report itself cannot be considered in determining the penalty and the administrative judge erred in doing so.

The deciding official testified that in selecting the penalty he considered the falsification, the large sum of agency funds that was missing, and the loose financial accountability at the St. Marys facility that made it impossible to affix responsibility for the missing funds.[6] HT at 166 (testimony of Caton). He also testified that he considered the fact that the appellant made false statements to the Postal Inspectors during their investigation. *Id.* Thus, the deciding official

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agree to provide false information for the report to be inaccurate. This, of course, is why sound audit practices call for double counts and similar safeguards.

[6] Although the agency has implied that the appellant may have taken Postal Service funds from the St. Marys Post Office, the agency also proposed Lilly's removal and sought to recover a $2,485.08 shortage in Postal Service funds from her. IAF, Tab 16 at 9-15. According to Lilly, the removal was reduced to a 14-day suspension and the record does not reflect the outcome of her appeal of the agency's efforts to recover the shortage. HT at 51-52. Because the agency apparently sought to seek restitution of the shortage from Lilly, it apparently does not hold the appellant responsible for the missing funds.

considered facts and alleged misconduct that did not form the basis of the agency's charges.

The appellant had been employed by the agency for 21 years and during that time rose from a part-time flexible position to a Postmaster position. IAF, Tab 12, Exhibit 1. The agency cites no prior disciplinary actions in its proposal notice, IAF, Tab 4, Subtab 4c, and there is no indication that the appellant's performance evaluations were less than fully successful. The only performance evaluations in the record date from 1990-1992 and they reflect that the appellant's performance was very good or outstanding. IAF, Tab 12, Exhibit 4. On the other hand, as a supervisor and Postmaster the agency may hold the appellant to a higher standard of conduct. *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 427 (1996); *Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, 284, *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table).

After weighing these mitigating and aggravating factors, and after considering the nature of the falsification charged and proved by the agency, we believe that the penalty of removal exceeds the tolerable limits of reasonableness for the sustained misconduct of falsification and unsatisfactory performance by violating Postal Service accounting procedures. In determining the maximum reasonable penalty, we are cognizant that, as a Postmaster, the appellant was solely responsible for the day-to-day operation of the St. Marys facility and that her violation of Postal Service accounting procedures by having access to both the safe combination and the vending credit key and her falsification of a subordinate's signature on an audit report created a risk to the financial management of the office. Thus, we find that the maximum reasonable penalty for the two sustained charges, when the attendant circumstances are considered, is a demotion to a position not more than two grade levels below the EAS-20 position held by the appellant and within her commuting area, thus effectively

removing her from a position of sole responsibility for the day-to-day operation of a Postal facility.

This is the final order of Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute in its place a demotion to a position not lower than the EAS-18 level and within the appellant's commuting area effective January 28, 1996. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should

include the dates and results of any communications with the agency about compliance.

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.